# ORIGINAL



Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

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| Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands | ) | ET Docket No. 95-183 |
| | ) | RM-8553 |
| Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz | ) | |

**REPLY COMMENTS OF PINNACLE SEVEN COMMUNICATIONS, INC.**

Pinnacle Seven Communications, Inc. ("Pinnacle Seven"), pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits reply comments in response to the Notice of Proposed Rulemaking and Order ("Order") adopted by the Federal Communications Commission ("FCC" or "Commission") on December 15, 1995 in the above-captioned proceeding.

## I. INTRODUCTION

Pinnacle Seven is a Florida corporation which has filed applications with the FCC for authorizations in the 38.6 - 40.0 GHz ("39 GHz") band so that it can provide wireless fiber services to customers in various metropolitan areas throughout the United States. Thus far, Pinnacle Seven has obtained several licenses, and continues to prosecute additional applications for authority to serve other major metropolitan areas.

## II. THE FREEZE ON PROCESSING NON-MUTUALLY EXCLUSIVE APPLICATIONS THAT WERE RIPE FOR GRANT AT THE TIME OF THE FCC'S ORDER IS ILLEGAL

The Order's Freeze on Processing Amendments to Mutually Exclusive Applications Exceeds the FCC's Authority Under the Communications Act. As Columbia Millimeter Communications, L.P. ("Columbia") correctly stated in its Comments, the FCC's decision to freeze the processing of applications that were ripe for grant at the time of the adoption of the Order is inconsistent with the FCC's statutory obligation under Section 309 of the Communications Act and must be reversed. See Columbia Comments at 6-12. Section 309(j)(6)(E) of the Communications Act of 1934 mandates that the FCC "use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings." 47 U.S.C. § 309(j)(6)(E). Based on this directive, Pinnacle Seven and many other applicants for FCC authorizations in the 39 GHz band filed amendments prior to adoption of the Order which resolve many cases of mutual exclusivity and render their applications ripe for grant. Although these filings are totally consistent and in accordance with Section 309(j)(6)(E), the Order proposes that the Commission employ auction procedures for such applications because they were mutually exclusive as of November 13, 1996. Such action is directly at variance with the mandate of Section 309(j)(6)(E) and is blatantly illegal. See, e.g., Comments of Columbia, supra; Comments of Telecommunications Industry Association at 14. Accordingly, Pinnacle Seven urges the FCC to modify that portion of its Order that holds in abeyance the processing and consideration of all amendments to pending applications for 39 GHz licenses received on or after November 13, 1995.

The Order's Freeze on Amendment Processing Contravenes the FCC's Own Rules. Not only is the FCC's freeze on the processing of amendments to 39 GHz applications filed on or after November 13, 1996 inconsistent with the Communications Act but also violates the FCC's own rules. Columbia Comments at 7-8. The Commission's rules encourage the filing of amendments to resolve mutual exclusivity. Thus, Section 21.23(a)(1) of the FCC's rules allows an applicant to amend as a matter of right before the application has been designated for hearing, comparative evaluation, or random selection. Moreover, Section 21.31(e)(2) authorizes the filing of amendments which resolve frequency conflicts with authorized stations or other pending applications. Many parties submitted comments in this proceeding urging the FCC to afford mutually exclusive applicants for the 39 GHz band a prescribed period of additional time to resolve their remaining conflicts and amend their applications accordingly. See, e.g., Comments of Bachow and Associates at 6; Comments of AT&T Wireless Services at 13; Sinatra Capital Corporation at 2; Comments of Commco, L.L.C. at 3-4; Comments of Telecommunications Industry Association at 15. Pinnacle Seven supports this approach.

The Order's Freeze on Processing Pending Amendments Is An Impermissible Retroactive Rulemaking. Although the Order was not adopted until December 15, 1996, it bars the processing of pending 39 GHz applications that are mutually exclusive as of November 13, 1995 and bars the processing of any amendments to pending applications filed on or after November 13, 1995. As a result of this action, 39 GHz license applicants, such as Pinnacle Seven, were first given notice of the November 13 freeze on December 15, 1995, over one month after the processing of amendments was suspended. Many parties filed

comments showing that the freeze implemented by the Order constitutes impermissible retroactive rulemaking. See, e.g., Comments of Columbia at 8-10; Comments of Ameritech Corporation at 4-5; Comments of Bachow and Associates, Inc. at 6; Comments of No Wire L.L.C. at 9-10. Pinnacle Seven supports these comments and agrees that such retroactive action is impermissible, unfair and inequitable.

As Columbia so aptly states, retroactive rulemaking is inherently suspect when an agency action "alters the past legal consequences of past actions" or "change[s] what the law was in the past." Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988). Comments of Columbia at 8. The retroactive freeze on the processing of pending applications and amendments can be justified only if it can be shown that such action furthers a legitimate legislative purpose. Motion Picture Ass'n of America, Inc. v. Oman, 969 F.2d 1154, 1156 (D.C. Cir. 1992). Here, there is no legitimate legislative purpose because both the Communications Act of 1934 and the Commission's own rules promote the avoidance of mutual exclusivity. 47 U.S.C. § 309(j)(6)(E); 47 C.F.R. § 21.23(a)(1); 47 C.F.R. § 21.31(e)(2). Had the freeze not been imposed retroactively, amendments filed before December 15, 1995 by Pinnacle Seven and other applicants could be processed and hundreds of cases of mutual exclusivity could be avoided. Because many 39 GHz applicants, including Pinnacle Seven, have had their rights altered and adversely affected by such retroactive action, the FCC is legally obligated to reverse this action and process amendments submitted prior to December 15, 1995.

## III. CONCLUSION

Based on the foregoing, Pinnacle Seven urges the Commission to vacate that portion of its Order freezing the processing of amendments that were filed prior to December 15, 1995 which eliminate mutual exclusivity. Once this is done, the FCC should move forward immediately to grant those non-mutually exclusive applications meeting all the rules for 39 GHz applications in effect at the time the Order was adopted.

Respectfully submitted,

PINNACLE SEVEN COMMUNICATIONS, INC.

By: Richard Landy
Richard Landy
President

April 1, 1996

## CERTIFICATE OF SERVICE

I, Richard Landy, hereby certify that copies of the foregoing Reply Comments of Pinnacle Seven Communications, Inc. were served by first-class mail, postage prepaid, this 1st day of April, 1996 to the following:

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